IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

BEN EARL BROWDER,

Petitioner,

-vs-

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

No. 76-5325

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Director argues (Resp. 7) that an order granting a petition for a writ of habeas corpus is not a final order if the district subsequently entertains an out-of-time motion for reconsideration. This is contrary to the ordinary rule, recently restated in United States v. Dieter, ___ U.S. ___, 50 L.Ed.2d 8 (1976), that only "timely petitions for rehearing . . . [render] the original judgment nonfinal for purposes of appeal," ___ U.S. at ___, 50 L.Ed.2d at 11.

To have been timely, it was necessary for the motion to reconsider to have been filed within the strict ten day period of Federal Rule of Civil Procedure 59. See Pet. 12 & n. 11; United States v. Braasch, 542 F.2d 442, 444 (7th Cir. 1976). In this case, the motion to reconsider was filed 28 days days after entry of the final order, and therefore did not render the original judgment nonfinal for purposes of appeal. Thus, the court of appeals lacked jurisdiction to reverse the order granting the petition for a writ of habeas corpus, as it appeared to do. (Pet, App. A36)

2. The Director apparently assumes that the warrant clause of the Fourth Amendment is "dead language," and that the Fourth Amendment allows the warrantless search of a dwelling place to arrest two suspects to determine which one, if either, should be charged with an offense. (Resp. 5) These important questions are worthy of review, especially when the Director does not dispute our showing (Pet. 14 n. 17) that relief in this case would not be precluded by Stone v. Powell, ___ U.S. ___ (July 6, 1976).

3. The facts known to the police at the time of arrest were in dispute in the district court. See Pet. 8, n. 6. The district court made no express findings of fact on these questions, apparently accepting our argument that the only material fact was undisputed, and required that relief be granted, because the police may not arrest two suspects in order to place them in a lineup to determine which one, if either, should be charged. In this Court, as in the court of appeals, the Director sets out the facts known to the police at the time of arrest in the light most favorable to the Director, the losing party in the district court. (See Resp. 4) The court of appeals recognized that the facts material to its view of the law were in dispute (Pet. App. A36), but resolved those facts in the first instance. This, we have argued, was a departure from the ordinary role of a court of appeals (Pet. 15 n. 19); we note that the Director has not responded to this argument, but rather repeats in this Court the same misleading statement of facts.

4. The Director has declined to respond to our request that the Court grant certiorari in this case "to review the burgeoning trend towards 'secret law' in the United States Courts of Appeals." (Pet. 22-26) The importance of published

opinions, especially when as here a result unsupported by any direct precedent is reached, was recently underscored by Judge Rosenn in Lowenschuss v. West Publishing Company, 542 F.2d 180, 185 (3d Cir. 1976):

> As ours is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. That segment of the public engaged in the practice of law necessarily must remain abreast of decisions which subtly shape the contours and the body of the evolving law. Practicing attorneys must be able easily to locate authoritative precedents for their posititions. Courts must be able to rely on briefs and citations of attorneys practicing before them and on their own research efforts to direct them quickly to the relevant cases. Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes.
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> Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions. . .

Subsequent to the filing of the petition in this case, the Fourth Circuit has adopted a rule for the publication of opinions, Local Rule 18, effective October 8, 1976. While this rule allows the reversal of a district court decision in an unpublished opinion, the rule allows the citation of unpublished opinions,§(d)(iii). At the present time, therefore, virtually all of the circuits have adopted rules pertaining to the use of unpublished orders to dispose of appeals; guidance is needed from this Court lest, as in this case, these unpublished opinion rules are used "to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues," N.L.R.B. v. Amalgamated Clothing Workers, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J.)

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

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